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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1959**

**No. 575**

THE FIRST NATIONAL CITY BANK OF NEW YORK,
*Petitioner,*

v.

INTERNAL REVENUE SERVICE OF THE UNITED STATES TREASURY DEPARTMENT,
*Respondent.*

**PETITION OF THE FIRST NATIONAL CITY BANK OF NEW YORK FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.**

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## PETITION OF THE FIRST NATIONAL CITY BANK OF NEW YORK FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner, The First National City Bank of New York, prays that this Court grant rehearing of its order of January 25, 1960, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the decision and judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed December 8, 1959, herein.

## Reasons for Granting Rehearing and Issuing the Writ

There are substantial grounds available to petitioner which were not previously presented to this Court. Briefly stated, these grounds are:

1. This Court is asked here to examine and define the jurisdictional limits of a subpoena[1] issued in the United States by the Internal Revenue Service, but affecting rights and properties outside of the United States. The subpoena was directed to a national bank which has established branches in foreign countries pursuant to Section 25 of the Federal Reserve Act of 1913, as amended.[2] The records ordered to be produced are Panamanian records kept and maintained by petitioner's Panama branch and relate to an account operated in Panama by a Panamanian corporation. The subpoena was issued to assist the Internal Revenue Service in a controversy between it and that Panamanian corporation. The activities of petitioner are not the subject of the investigation. The case raises the question whether the Internal Revenue Service may under these circumstances by use of the subpoena power and by reason of the sovereignty of the United States over petitioner, require the production of records which are beyond the territory of the United States and within the territorial jurisdiction of a friendly foreign sovereign. The decision of the Court of Appeals in upholding the extra-territorial efficacy of the subpoena thus involves a funda-

[1] The process referred to here is called variously in the opinion of the Court of Appeals a "summons", a "subpoena duces tecum", and a "subpoena". Petitioner is not concerned with the name applied; for convenience it will be referred to hereafter as a subpoena."

[2] Act of Dec. 23, 1913, C. 6, §25, 38 Stat. 273; Sept. 7, 1916, C. 461, 39 Stat. 753; Sept. 17, 1919, C. 60 §1, 2, 41 Stat. 285, 286; Aug. 23, 1935, C. 614, §203(a), 49 Stat. 704; Title 12 U. S. C. A. 601-604.

mental question of "jurisdiction" which justifies review by this Court. Review and settlement of this question by this Court should be made because of its importance in the field of international law and relations and because of its impact on the foreign commerce of the United States and on the operations in foreign countries of branches and subsidiaries of national banks.

2. The head offices of a majority of banks which have foreign branches or subsidiaries are located in the Second Circuit. Other circuits will have little occasion to review the problems presented here and a conflict of decisions is therefore improbable. The concentration of the head offices in the Second Circuit justifies review by this Court, so that the "jurisdiction" over the records of foreign branches and subsidiaries may be authoritatively defined by this Court. *Schriver-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50. Review here is particularly warranted because in the 47 years that Section 25 of the Federal Reserve Act has been in existence, the decision by the Court of Appeals is the first instance where the courts have failed to recognize that it was the intent and purpose of the Congress that the foreign branches of national banks were to operate as independent institutions, subject only to regulatory controls exercised by the Federal Reserve Board and the Comptroller of the Currency. The extent and purpose for which records of the bank must be produced for examination in the United States have never before been presented to this Court. The pronouncement by this Court is needed for the guidance and protection of all American banks which do business abroad through branches or subsidiaries.[3]

[3] In the light of the reason for rehearing presented in this petition, the Questions Presented on the petition for certiorari require rephrasing. These as rephrased may be found in the Appendix to this petition, p. App. 1.

This case involves a fundamental question of jurisdiction—the extent and limits of the sovereignty of two friendly states, the United States and the Republic of Panama, over records of Panamanian transactions which are in the possession of the Panamanian branch of an American national bank. The Court of Appeals equated the question of jurisdiction with power and concluded that as the head office had the "power" to cause the records to be sent from the branch to the head office, this ended the matter. But the question of jurisdiction cannot be disposed of that simply. National power may be used within or without the territory of the nation using it. But if unerbed, as here, even when used within that territory it may affect persons and property in other nations. If history teaches us anything, it is, that nations may not use unlimited power and remain at peace with their neighbors. In these tempestuous years internationally, no wise nation would exercise "power" without recognition of the limitation imposed on such use by the country's position in the world and by its present recognized world policies.

> "Law does not arise from physical power or coercion alone. Law is a product of consent as well as coercion . . . When a national state exercises jurisdiction with respect to some phase of the international society, policy should never be equated with legitimacy or physical power. For answers to the formal question of legitimacy or the practical question of physical power will never provide an answer to the ultimate question of the wisdom of action."[4]

The United States has encouraged foreign investment; has encouraged American institutions to open branches and subsidiaries abroad; it has encouraged friendly for-

[4] Kenneth S. Carlston, "The Grasp of Jurisdiction", Proceedings of the American Society of International Law, annual meeting 1959, pgs. 170, 171-3.

eign sovereigns to accept the establishment of American-owned business institutions within their countries. In doing so, the United States has made, both tacitly and explicitly, representations to all countries of the world that the foreign country's sovereignty will continuously be respected. In determining whether the Internal Revenue Service's tax processes should be given extra-territorial force, these and other considerations must be kept in mind. The sovereignty of the United States over the head office must be weighed against the sovereignty of Panama over the branch and its records. The objectives of the Congress in enacting Section 25 of the Federal Reserve Act must also be considered. This was not done by the Court of Appeals.

The extra-territorial application of the Internal Revenue Service's tax processes should not be made dependent, as the Court of Appeals did, upon whether the production of the Panamanian records "would require action by personnel in Panama in violation of the constitution and laws of Panama." The Court of Appeals thus decided the case as a pure question of expediency. The Internal Revenue Service was advised to continue to maintain its grasp of jurisdiction unless it was determined by Panama that actions by petitioner's personnel there, which the subpoena required them to take, were in conflict with the laws of that country. The enunciation of such a doctrine merely invites punitive action by the foreign state and the enactment of legislation which will make impossible the functioning of foreign branches "for the furtherance of the foreign commerce of the United States" and "as fiscal agents of the United States."

This Court should grant review to establish a proper guide to the Internal Revenue Service and all other agencies of this Government, as well as to the American banking community, in respect to the jurisdiction that may be exercised in this country over branches of Ameri-

can banks throughout the world. If the Court of Appeals' decision is permitted to stand as the guide, then jurisdiction will vary as to each branch and will depend upon the constitution and the laws of the country in which the branch is located. As applied to this petitioner, with its 68 branches in 25 foreign countries, this will result in uncertainty and confusion. The petitioner does not know from this case nor can it know in any similar future proceeding what is the jurisdiction of the Internal Revenue Service and it can find out only by subjecting its officers to contempt proceedings. The question of jurisdiction must be decided upon broader and more fundamental grounds than those expressed by the Court of Appeals. The jurisdiction of the United States cannot be made dependent on the laws and attitudes of other countries.

This case shows all too clearly that it is not safe to assume that a scrupulous regard for international law will be observed by administrative agencies. They are prone to expand their own power and prerogatives; in pursuing their admittedly legitimate objectives they are apt to employ any means which come to hand to accomplish those objectives without placing upon themselves the limitations which as agents of the United States they are under a duty to do. A legitimate objective can be pursued only by legitimate means. It is for the salutary purpose of keeping the acts of administrative agencies within due bounds that this Court should review the decision and define the jurisdiction of the Internal Revenue Service to issue subpoenas which affect the business records of foreign corporations in possession of the foreign branches of the petitioner.

The proper rule of international law and comity to be applied here is that, except as prescribed by the Congress, the sovereignty of the United States over the head office of a national bank will not be exercised in such a manner as to conflict with the sovereignty of a foreign state

over the foreign branch. In a controversy exclusively between the Internal Revenue Service and a foreign corporation, the sovereignty of the United States over the head office may not serve as the basis of a subpoena to compel the production of records which could not be obtained had the foreign corporation used banking facilities other than those of the branch of the American bank.

The Court of Appeals apparently recognized that the question of Panamanian sovereignty had to be considered but it dismissed the point by saying in effect that the Republic of Panama had yielded its sovereignty to that of the United States when it granted a license for the Panama branch to operate in Panama, knowing that the branch was required to furnish information to the Comptroller of the Currency and to submit to regulation by the Governors of the Federal Reserve System. The conclusion of the Court of Appeals is totally wrong.

When Panama received this branch bank, Panama knew the bank's financial condition would be carefully supervised from the United States. This was to the country's own advantage. It would then have a financially responsible American institution domiciled within its country, prepared to do banking business and, as the Federal Reserve law suggests, facilitate the foreign commerce with the United States. The lack of basis for the conclusion above cited of the United States Court of Appeals for the Second Circuit lies in its erroneous reasoning that if Panama, for its own desires and wants, has remitted its sovereignty in *one* respect by permitting American supervision over the *financial condition* of a banking institution in Panama, this was proof that Panama must also have been willing to have every other Government official in the United States examine any records for any other conceivable purpose. Here, the purpose is to secure information from the bank, as from a tax-informer, of transactions within Panama of a Panamanian corporation. There is absolutely no reason to believe

that Panama ever consented to such a derogation of its sovereignty when it permitted an American bank to set up a banking business there.

The Congress of the United States has not prescribed that the records of foreign branches should have the same status as records within this country. The legislative history of Section 25 of the Federal Reserve Act indicates that the Congress intended that the foreign branches operate as "independent institutions" (H. Rep. No. 69 on H. R. 7837, 63d Cong. First Session, page 74). The Congress "believed that with the extension of national-bank powers which is provided for in the present act, such branches of national banks would be amply able to meet the requirements of their clientele wherever it might be necessary for them to operate." (H. Rep., *supra*, p. 30). The requirements of the foreign clientele of the foreign branches cannot be met if the Internal Revenue Service has jurisdiction to require the production of records kept and maintained in foreign countries and relating to the foreign accounts and foreign transactions of the foreign clientele.

The proper construction to be given Section 25 of the Federal Reserve Act is that American sovereignty and jurisdiction will be limited to the controls exercised by the Comptroller of the Currency and the Federal Reserve Board. In other respects, the foreign branch is to be treated as an independent institution, subject to the sovereignty of the jurisdiction in which it is located. In this way, the delicate problems of conflicting sovereignties are resolved. By this means, foreign branches of American banks are placed on a par with their foreign competitors, both legally and competitively. As it is, the decision of the Court of Appeals places foreign branches of American banks at a serious disadvantage. It frustrates the intent and purpose of the Congress in enacting Section 25 of the Federal Reserve Act. It creates most serious international problems.

## Conclusion

This Court is the final arbiter as to the jurisdiction of the United States and its agencies. The issues presented by this case are of such fundamental importance and the impact on the foreign operations of national banks is so far-sweeping that review by this Court is essential.

For the reasons set forth above and in the petition for certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

February 10, 1960

Respectfully submitted,

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## Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

February 10, 1960

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# APPENDIX

## Questions Presented by Petitioner for Rehearing

May the Internal Revenue Service of the Department of the Treasury of the United States Government, through its admitted jurisdiction over a national bank having branches in foreign countries, by the service of a subpoena in the United States on the head office:

1. Coerce that American banking corporation by threat of contempt proceedings against its officers to use its authority as a master over the employees of a foreign branch to remove business records of the branch from the jurisdiction of a friendly foreign country (in this instance Panama) and produce them within the United States in a controversy which is exclusively between an agency of this Government and a Panamanian corporation?

2. Rely on the provisions of the Federal Reserve Act or any part of it (under which the bank is subject to financial supervision by the Comptroller of the Currency for determination as to its financial soundness and the propriety of its banking procedure) as a pretense to compel the employees of that bank in foreign countries to commit acts having no relation whatever with the bank's financial condition or the lawfulness of its operations either within the United States or elsewhere?

3. Rely on the fact that a bank in the conduct of its own business and to determine its own financial position may have the right to bring records of a foreign branch into the United States as justification to compel the bank to bring records into this country for use in a tax proceeding to which the bank is not a party?

4. Make use of the branch in a foreign country (in this instance Panama) to secure information concerning transactions of a Panamanian corporation within that friendly foreign state over which there would be not even a pretense of authority if the Panamanian corporation had used banking facilities other than that of a branch of an American bank?

5. Compel the production of documentary evidence from a friendly foreign country (in this case Panama) without notice to any governmental institution of that country, and in a manner not provided for or permitted by any treaty between the United States and that country and in a manner wholly outside of the rules of international judicial cooperation?